

TO: All Assessing Officers
FROM: State Tax Commission

No. 14 - July 25, 1983
Opinions - Boards of Review
Oath of Office

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

OFFICERS AND EMPLOYEES: Failure of member of a township board of review to take oath of office

A person appointed to the office of member of a township board of review who fails to take the oath of office within ten days as required by statute, but takes the oath before discharging any of the duties of the office, is an officer de jure.

A person appointed to such office who fails to take the oath of office as required by law, but who continues to occupy the office, is an officer de facto.

Opinion No. 6144

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APR 07 1983

You have requested my opinion on the following question:

What is the legal status of a person who, appointed as a member of a township board of review, (1) fails to take the oath of office within the ten-day period required by the statute, but takes the oath of office before discharging any of the duties of the office, or (2) does not take the oath of office, but proceeds to exercise his authority as a member of the township board of review?

The General Property Tax Act, 1893 PA 206, § 28; MCLA 211.28; MSA 7.28, creates a township board of review consisting of three taxpaying electors of the township appointed by the township board.

1893 PA 206, § 28, supra, provides:

"Members appointed hereafter to the board of review shall serve for terms of 2 years beginning at noon on January 1 of each odd-numbered year. Each member of the board of review shall qualify by taking the constitutional oath of office within 10 days after appointment. ..."

The law is well settled that unless a municipal officer is regularly and properly appointed or elected and qualified and holding office during a lawful term, the officer is not a de jure officer.

RS 1846, c 15, § 3, as amended; MCLA 201.3; MSA 6.693, in pertinent part, provides:

"Every office shall become vacant, on the happening of any of the following events, before the expiration of the term of such office:

"7. His refusal or neglect to take his oath of office, or to give, or renew any official bond, or to deposit such oath, or bond, in the manner and within the time prescribed by law."

The answer to the first part of your question is controlled by People, ex rel Bennett v Benfield, 80 Mich 265, 269; 45 NW 135 (1890), which involved a quo warranto proceeding to test the right of the respondent to hold the office of township drain commissioner upon his failure to file a sufficient bond as required by law. The court, noting that the absence of any express provision declaring the office vacant upon such failure, declined to find a vacancy in such office, stating:

"[T]he courts generally hold that, even though the statute expressly provides that upon a failure to give a bond within the time prescribed the office shall be deemed vacant, and may be filled by appointment, the default is a ground for forfeiture only, and not a forfeiture ipso facto, and that if, notwithstanding this default, the State or other power sees fit to excuse the delinquency by granting the officer his commission, the defects of his title are cured, and it is a title de jure, having relation back to the time of his election or appointment."

While RS 1846, c 15, § 3, supra, provides for such vacancy on failure of such condition, the officer in the first


part of your question filed the requisite oath of office before undertaking the duties of the office and before any steps were taken to fill any vacancy arising from such failure to file the oath. Under the authority of Benfield, supra, the actions taken by such officer were as a de jure officer.

It is my opinion in answer to the first part of your question that the officer is a de jure officer and that the actions taken were those of a de jure officer.

Turning to the second part of your question which relates to a person appointed to the office of member of the township board of review but who failed to take the oath of office, in such instance, a vacancy in the office would occur by virtue of RS 1846, c 15, § 3(7), supra. As to the effect of the actions taken by such person pending the filling of such vacancy or the filing of the oath of office as recognized by Benfield, supra, it is necessary to consider Greyhound Co v Public Service Commission, 360 Mich 578; 104 NW2d 395 (1960), which held that a public officer, in actual occupancy of a public office and performing its duties, is a de facto officer. The actions of such de facto officer may not be questioned on jurisdictional grounds.

Thus, the officer referred to in the second part of your question is a de facto officer and the actions taken are not subject to question on jurisdictional questions.

In answer to the second part of your question, it is my opinion that a person appointed to the office of member of a township board, who fails to take the oath of office, has the status of a de facto officer while continuing to occupy such office.


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